92-1831

Supreme Court, U.S.
FILED
APR 19 1993
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NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

NORTHERN KENTUCKY WELFARE
RIGHTS ASSOCIATION, and
MICHELLE ASBURY, PETITIONERS

V.

BRERETON JONES,
GOVERNOR OF KENTUCKY RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Section 8624 (b)(2) of the Low Income Home Energy Assistance Act, 42 USC Section 8621-29, confer private rights enforceable under 42 USC Section 1983, and did Congress foreclose such a remedy?

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RIGHTS ASSOCIATION, and
MICHELLE ASBURY,
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V.

BRERETON JONES,
GOVERNOR OF KENTUCKY
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Northern Kentucky Welfare Rights Association, and Michelle Asbury, (hereinafter Petitioners), who were appellants below, on their own behalf and on behalf of all persons similarly situated, hereby petition this Court for a writ of certiorari to the judgment of

the United States Court of Appeals for the Sixth Circuit on this matter.[1]

OPINIONS BELOW

The opinion entered by the Court of Appeals for the Sixth Circuit in No. 92-5634 (January 19, 1993) is included in the Appendix at A1-A12. The opinion of the District Court for the Eastern District of Kentucky, Frankfort Division, Case No. 91-78, dated January 28, 1992,

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[1]The Northern Kentucky Welfare Rights Association, an unincorporated association of at least forty members, the majority of whom were recipients of Aid for Families with Dependent Children, and two individuals, Dolores A. Flood and Michelle Asbury, filed this suit on their own behalf and on behalf of a class of persons similarly situated. Dolores A. Flood was not an appellant below and is not a petitioner herein. (Continue Footnote #1 on next page).

and the Order of Dismissal, dated April 14, 1992 are included in the Appendix at B1-B4.

Since these decisions relied almost exclusively upon a prior decision of the Sixth circuit, Cabinet For Human Resources, Commonwealth of Kentucky v. Northern Kentucky Welfare Rights Association, 954 F.2d 1179 (6th Cir. 1992), that decision is included at Appendix C1-C44.

Defendants in the original suit were the Governor, (Wallace G. Wilkinson at that time), Dr. Harry Cowherd, Secretary of the Kentucky Cabinet for Human Resources and Mike Robinson, Commissioner of the Department for Social Insurance of the Kentucky Cabinet for Human Resources. Only the governor, now Brereton Jones, is a respondent, as neither defendant Cowherd nor Robinson appealed the original District Court decision. Northern Kentucky Welfare Rights Association, et al v. Wallace G. Wilkinson, United States Court of Appeals for the Sixth Circuit, Case No. 90-6268, decided May 24, 1991. (Unreported, copy attached at Appendix, D1-D23).

JURISDICTION

The jurisdiction of this Court to issue a writ of certiorari in this case is grounded upon 28 USC Section 1254(1).

The judgment sought to be reviewed was entered by the Court of Appeals for the Sixth Circuit on January 19, 1993, and this petition is filed within ninety (90) days thereafter.

STATUTES AND REGULATIONS INVOLVED

This case involves the Low Income Home Energy Assistance Act of 1981 ("LIHEAP" or the "Act"), 42 USC Section 8621-29. The most important section of the Act for purposes of this petition is 42 USC Section 8624(b)(2) which reads, in pertinent part as follows:

> (b) Certifications required for covered activities
>
> As part of the annual application required by subsection (a) of this section, the chief executive officer of each State shall certify that the State agrees to-

(1) use the funds available under this subchapter for the purposes described in section 8621(a) of this title and otherwise in accordance with the requirements of this subchapter, and agrees not to use such funds for any payments other than payments specified in this section;

(2) make payments under this subchapter only with respect to-

(A) households in which 1 or more individuals are receiving-

(i) aid to families with dependent children under the State's plan approved under part A of title IV of the Social Security Act [42 U.S.C.A. Section 601 et seq.] (other than such aid in the form of foster care in accordance with section 408 of such Act) [42 U.S.C.A. Section 608];

(ii) supplemental security income payments under title XVI of the Social Security Act [42 U.S.C.A. Section 1381 et seq.];

(iii) food stamps under the Food Stamp Act of 1977 [7 U.S.C.A. Section 2011 et seq.]; or

(iv) payments under section 415, 521, 541, or 542 of Title 38, or under section 306 of the Veterans' and Survivors'

Pension Improvement Act of 1978; or

(B) households with incomes which do not exceed the greater of-

(i) an amount equal to 150 percent of the poverty level for such State; or

(ii) an amount equal to 60 percent of the State median income;

except that no household may be excluded from eligibility under this subclause for payments under this subchapter for fiscal year 1986 and thereafter if the household has an income which is less than 110 percent of the poverty level for such State for such fiscal year?

42 USC Section 8624(b)(2). (Emphasis our own).

The questions presented are whether 42 USC Section 8624(b)(2) creates rights which can be enforced under 42 USC Section 1983 and whether Congress has foreclosed such enforcement.

STATEMENT OF THE CASE AND INITIAL JURISDICTION

This action was originally brought as a class action by the Northern

Kentucky Welfare Rights Association and two named plaintiffs on behalf of a class of persons who were challenging Kentucky's implementation of the Low-Income Home Energy Assistance Program (LIHEAP) for Fiscal Year 1990.

The LIHEAP created a voluntary state-federal program in which the Secretary of Health and Human Services (HHS) was authorized to grant funds to states to assist low income households in meeting the costs of home energy. Participating states were required to submit yearly applications with assurances that the conditions enumerated in 42 USC Section 8624(b) would be met. Kentucky has participated in LIHEAP since its inception in 1981, and also submitted an application to participate in Fiscal Year 1990.

Kentucky's plan was submitted to HHS in early September of 1989. The plan called for dividing its $16 million grant of federal money into two components: approximately $5 million of the fund was allocated to a subsidy program and the $10 million plus remaining was allocated to a crisis intervention program. Eligibility to participate in the subsidy program was limited to only those financially eligible households containing an elderly or disabled member.

Petitioners challenged this limitation on behalf of financially eligible households that did not contain an elderly or disabled member. Petitioners argued that Kentucky's LIHEAP for Fiscal Year 1990 violated the conditions for receipt of a grant found at 42 USC Section 8624(b). The District Court for the Western District of

Kentucky at Louisville found for Petitioners. Only the Governor appealed. The United States Court of Appeals for the Sixth Circuit vacated the judgment and remanded, on venue grounds, to the Eastern District of Kentucky at Frankfort. Before that Court could reach the merits, the U.S. Court of Appeals for the Sixth Circuit issued its decision in a later suit concerning Kentucky's Fiscal Year 1991 LIHEAP. Cabinet for Human Resources, Commonwealth of Kentucky v. Northern Kentucky Welfare Rights Association, 954 F.2d 1179 (6th Cir. 1992). (Appendix C1-C44).

The District Court at Frankfort dismissed the challenge to the Fiscal Year 1990 LIHEAP program finding that due to the holding in Cabinet for Human Resources, Commonwealth of Kentucky v. Northern Kentucky Welfare Rights

Association, 954 F.2d 1179 (6th Cir. 1992), Petitioners had no rights under LIHEAP which could be enforced in a 42 USC Section 1983 suit. The U.S. Court of Appeals for the Sixth Circuit affirmed the dismissal in its January 19, 1993, decision.

REASONS FOR GRANTING THE WRIT

I. Introduction

Rule 10.1 of the Rules of this Court provides that a writ of certiorari will be granted only when there are special and important reasons therefor. Rule 10.1 lists among such reasons conflicting decisions by United States Courts of Appeal and conflicts with decisions of this Court.

Both types of conflicts exist in this case and the rights of hundreds of thousands of people are effected. For example, in the Fiscal Year 1990 Kentucky

Plan, 186,000 households with incomes below 110% of poverty were categorically excluded. Nationally, Congress has funded LIHEAP in each fiscal year since 1990, with all of the states participating. The fiscal year 1993 funding exceeded $1.3 billion dollars and millions of households received benefits.

Given the magnitude of this program and the number of low income persons effected, it is important that the question of their rights under the program be resolved.

II. The Decision Below Conflicts With Decisions By The Eighth And Second Circuits Concerning The Availability Of 42 USC Section 1983 To Enforce LIHEAP Rights

This decision of the Sixth Circuit holding Section 1983 to be unavailable for private enforcement of LIHEAP is in direct conflict with a

decision by the Eighth Circuit, and in implicit conflict with a decision by the Second Circuit.

In Crawford v. Janklow, 710 F.2d 1321, 1326 (8th Cir. 1983), the Eighth Circuit specifically held that the Low-Income Home Energy Assistance Act of 1981 created substantive rights cognizable under section 1983. In Crawford v. Janklow, 710 F.2d 1321 (8th Cir 1983), the State of South Dakota had categorically excluded from LIHEAP eligibility all persons residing in subsidized or public housing. The excluded class argued that South Dakota's actions violated 42 USC Section 8624(b). The Eighth Circuit held that LIHEAP did create rights enforceable under Section 1983. Id. at 1326. In addition, the

Eighth Circuit held that

> the express remedy created in the home energy assistance legislation to prevent noncompliance with the section 8624(b) conditions-withholding of funds from the states by the Secretary of Health and Human Services, 42 USC Section 8627 (1981) - is not an "exclusive" remedy which would foreclose private rights of action under section 1983.

Crawford v. Janklow, 710 F.2d 132, 1326 (8th Cir. 1983).

The Eighth Circuit has issued two later decisions in which it is implicit that LIHEAP creates rights which can be enforced under Section 1983. Clifford v. Janklow, 733 F.2d 534 (8th Cir. 1984), Crawford v. Janklow, 733 F.2d 541 (8th Cir. 1984).

In Rodriguez v. Cuomo, 791 F.Supp. 363 (S.D.N.Y. 1990), the Court found that the provisions of LIHEAP could be enforced, citing Crawford v. Janklow, 710 F.2d 1321, 1324-26 (8th Cir. 1983).

The District Court decision in Rodriguez v. Cuomo was appealed to the Second Circuit on other grounds. The District Court's reliance on Crawford v. Janklow, was not challenged in the appeal. The Second Circuit also did not raise this sua sponte. Thus, by implication, the Second Circuit has assumed that LIHEAP creates rights enforceable under Section 1983. Rodriquez v. Cuomo, 953 F.2d 33 (2nd Cir. 1992).

The State of Wisconsin also participated in LIHEAP and excluded residents of subsidized housing from eligibility. This exclusion was challenged in a lawsuit and the District Court for the Western District of Wisconsin ruled that the excluded class did have rights under LIHEAP which could be enforced in a Section 1983 action.

Boles v. Earl, 601 F.Supp. 737, 744 (W.D. Wis 1985). This decision was not appealed to the Seventh Circuit.

It should also be noted that the Fourth Circuit in Hunt v. Robeson County, 816 F.2d 150 (4th Cir. 1987), has held that LIHEAP creates no rights enforceable under Section 1983. Thus, there is clear and unequivocal conflict in the Courts of Appeals decisions. LIHEAP recipients can enforce the ACT in the Second, Seventh and Eighth Circuits, but may not enforce the Act in the Fourth and Sixth Circuits.

LIHEAP has remained essentially the same during the period covered by these decisions. Furthermore, these decisions have involved the same or similar provisions of the Act, i.e., 42 USC Section 8624, a fact which brings

into clearer focus the present conflict between the Circuits.

III. The Sixth Circuit's Decision Conflicts With Suter v. Artist M., U.S. ,112 S.Ct. 1360 (1992)

The decision in this case by the Sixth Circuit clearly conflicts with this Court's decision in Suter v. Artist M., ____U.S.____, 112 S.Ct. 1360 (1992).

In Maine v. Thiboutot, 448 U.S. 1 (1980), this Court recognized that 42 USC Section 1983 provides a cause of action for violations of federal statutes. Two exceptions to this rule have been recognized. First, no cause of action will lie where the statute does not create "enforceable rights" within the meaning of Section 1983. Wright v. Roanoke Redevelopment and Housing Authority, 479 U.S. 418, 423 (1987). The second exception occurs when Congress has

foreclosed enforcement of the statute in the enactment itself. Wilder v. Virginia Hospital Assn., 496 U.S. 498, 508 (1990).

Prior to Suter, the determination of whether a federal statute created enforceable rights was made by applying a three part test as stated in Golden State Transit Corporation v. Los Angeles, 493 U.S. 103 (1989). Although Wilder, Wright and Golden State Transit Corp. were cited as precedent in Suter, the three prong test from Golden State was not formally used. See, e.g., Suter v. Artist M., ___ U.S.____, 112 S.Ct. 1360, 1366-68 (1992) (citing, inter alia, Golden State, Wright). Thus, Suter appears to weaken these earlier precedents without overruling them. However, at least one court believes...(that) "it is both prudent and possible to synthesize the

teachings of Suter with the Court's prior precedents...", Stowell v. Ives, 976 F.2d 65, 71 (1st Cir. 1992).

One of the main teachings of Suter is that each provision of an act in question must be interpreted by its own terms. Suter v. Artist M., _____U.S.___, 112 S.Ct. 1360, 1367 n.8. (1992). The inquiry in Suter focused on the "reasonable efforts" clause of 42 USC Section 671(a)(15) and resulted in the conclusion that although the Act was mandatory, it only required that the state have a plan, approved by the Secretary, which contains the sixteen (16) listed features in the Act. Suter v. Artist M., _____U.S._____, 112 S.Ct. 1360, 1367 (1992).

All of the parties in Suter agreed that the state did have a plan, approved by the Secretary, which

contained the sixteen (16) listed features. The Court in Suter then held that since reasonable efforts was not otherwise defined....

> the reasonable efforts language does not confer an enforceable right upon the Act's beneficiaries. The term "reasonable efforts" in this context is at least as plausibly read to impose only a rather generalized duty on the State, to be enforced not by private individuals, but by the Secretary in the manner previously discussed.

Suter v. Artist M., _____U.S._____, 112 S.Ct. 1360, 1369 (1992).

The Court in Suter also pointed out that:

> The language of other sections of the Act also shows that Congress knew how to impose precise requirements on the states aside from the submission of a plan to be approved by the Secretary when it

> intended to. For example, 42 USC Section 672(e) provides that "[n]o Federal payment may be made under this part "for a child voluntarily placed in foster care for more than 180 days unless within that period there is a judicial determination that the placement is in the best interest of the child. That the "reasonable efforts" clause is not similarly worded buttresses a conclusion that Congress had a different intent with respect to it.

Suter v. Artist M, _____U.S._____, 112 S.Ct. 1360, 1369 (1992).

The language of LIHEAP requires the submission of a plan to be approved by the Secretary, but also imposes precise requirements on the States. Those precise requirements are that the state agrees to make payments only with respect to certain enumerated households. 42 USC Section 8624(b)(2). The state

also agrees not to exclude from eligibility for payment any household with income under 110% of poverty. 42 USC Section 8624(b)(2).

In Stowell v. Ives, 976 F.2d 65, 71 (lst Cir. 1992), the Court stated that:

> ...the Suter court distinguished between cases in which, on the one hand, a statutory provision is, in effect, a communication to a specific federal official whose approval is required prior to disbursement of federal funds (Section 671(a)(15)), and cases in which, on the other hand, a statutory provision is, in effect, a communication from Congress to those states that elect to apply for earmarked funds (Section 672(e)).
>
> Provisions of the former sort - such as those at issue here and in Suter- will not support a Section 1983 action.

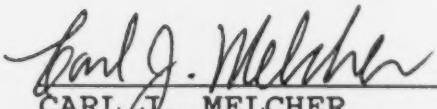
The 8624(b)(2)(B) provision from LIHEAP in issue in this case, not to exclude households under 110% from eligibility, is a clear and precise communication from Congress to those states that elect to apply for earmarked funds. As such, this provision will support a Section 1983 action and thus the decision of the Sixth Circuit conflicts with this Court's decision in Suter v. Artist M., _____U.S._____, 112 S.Ct. 1360 (1992).

CONCLUSION

The decision of the U.S. Court of Appeals for the Sixth Circuit is in explicit conflict with decisions of the Eighth Circuit and is implicit conflict with a decision from the Second Circuit. This decision also conflicts with this Court's decision in Suter v. Artist M..

Wherefore, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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1/19/93

No. 92-5634

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NORTHERN KENTUCKY WELFARE RIGHTS ASSOCIATION AND MICHELLE ASBURY,

Plaintiffs-Appellants,

v.

BRERETON JONES, Governor of Kentucky,

Defendant-Appellee.

On Appeal from the United States District Court for the Eastern District of Kentucky

---

BEFORE: KENNEDY and BATCHELDER, Circuit Judges, and ENGEL, Senior Circuit Judge.

PER CURIAM: The Northern Kentucky Welfare Rights Association (the "Association"), representing certain low-income plaintiffs in this class action, appeals the dismissal of its 42 U.S.C. Section 1983 action against officials of the Commonwealth of Kentucky.

The Association brought this action for declaratory and injunctive relief against the Governor of Kentucky and the Cabinet for Human Resources to prevent the alleged unlawful implementation of the Low-Income Home Energy Assistance Act of 1981 ("LIHEAA" or the "Act"), 42 U.S.C. Sections 8621-29, for the fiscal year 1990. On August 30, 1990, the District Court for the Western District of Kentucky enjoined the Commonwealth from implementing the Low-Income Home Energy Assistance Program ("LIHEAP") as planned and granted the Association's motion for summary judgment. In the state's appeal, this Court held that the action had been brought in an improper venue, vacated the injunction and remanded the case for transfer to the Eastern District of Kentucky. Northern Kentucky Welfare

Rights Association v. Wilkinson, 1991 U.S.App. LEXIS 11472 (unpublished opinion).

In separate but related litigation, the District Court in the Eastern District of Kentucky issued a permanent injunction against Kentucky's Cabinet for Human Resources (the "Cabinet"), ordering it not to implement another aspect of the Kentucky LIHEAP as proposed. On January 24, 1992, this Court dissolved the injunction for lack of jurisdiction. Cabinet For Human Resources v. Northern Kentucky Welfare Rights Association, 954 F.2d 1179 (6th Cir. 1992). To distinguish the two cases, the present case will be referred to as LIHEAP I, since it was filed first, and the other case decided in the January 24, 1992 decision will be referred to as

LIHEAP II. Based on the decision in LIHEAP II, the District Court dismissed LIHEAP I on January 28, 1992. The Association filed a timely notice of appeal.

We AFFIRM.

I.

The purpose of LIHEAA is to provide eligible households with assistance in meeting the costs of home heating. The Act authorizes the Secretary of Health and Human Services ("HHS") to issue block grants to participating states that give assurances that the program will be administered according to the conditions found in the Act. These conditions include eligibility requirements of beneficiaries, public hearings, outreach activities, accounting methods and the

provision of administrative remedies. See U.S.C. Section 8624(b).

The Commonwealth of Kentucky devised a LIHEAP which was approved by the Secretary of HHS. Under its program, Kentucky divided the $16 million of federal money it received into two components: one-third of the fund is allocated to what is known as the subsidy component of the program and two-thirds is allocated for crisis intervention. R.14 Findings of Fact; Joint App. at 268-69.

The crisis funds are paid to community agencies which in turn distribute them to all households which are below 110% of the federal poverty level and which are experiencing a home heating crisis. However, eligibility to participate in the subsidy component of

the program is limited to the elderly and the disabled. The defendants determined that the elderly and the disabled are more needy than the plaintiff class. The Association is challenging this limitation on behalf of those low-income households that do not include any elderly or disabled persons, that would otherwise qualify to apply for the subsidies.

The Association asserts that the non-eligibility of the plaintiff class for heating assistance subsidies violates the Act for two reasons. First, section 8624(b)(5) requires participating states to certify that "the highest level of assistance will be furnished to those households which have the lowest incomes and the highest energy costs in relation to income, taking into account family

size." The Association claims that those excluded had lower incomes and higher fuel bills than some of the subsidy eligible group. Second, section 8624(b)(2)(B) provides that "no household may be excluded from eligibility...if the household has an income which is less than 110 percent of the poverty level for such State." The Association claims that households excluded from eligibility for subsidies had incomes less than 110 percent of the poverty level.

II.

Before this court may reach the merits of these issues, it must have federal jurisdiction over the Association's claims. In LIHEAP II, this Court held that, prior to exhausting state administrative remedies, there is no implied private cause of action under

the Act, and that the Act creates no independent rights enforceable under 42 U.S.C. Section 1983. LIHEAP II, 954 F.2d at 1180.

In LIHEAP II, the Association raised three claims challenging the Cabinet's administration of the Kentucky LIHEAP. First, it claimed that Kentucky's method for calculating benefit levels unlawfully discriminated against tenants of publicly subsidized housing, in violation of section 8624(f)(1) (formerly 8624(f)). Next it claimed that owners and renters were not treated equally, in violation of Section 8624(b)(8)(B) (formerly 8624(b)(8)). Finally, it claimed that the Kentucky LIHEAP did not provide the highest benefits to applicants with the lowest incomes and highest energy costs in relation to income, in violation of

Section 8624(b)(5). The District Court addressed only the first claim and held that the Kentucky LIHEAP violated Section 8624(f) which prohibits states from reducing the federal heating subsidy based on a household's receipt of other forms of public assistance.

This Court did not reach the merits of any of the three challenges because we found that there was no federal jurisdiction over the Association's claims. After a lengthy analysis of the factors the Supreme Court has provided to determine whether a private remedy is implicit in a federal statute where the statute is silent, see Cort v. Ash, 422 U.S. 66 (1975), we found that there is no implied private action under LIHEAA. In a related inquiry, we concluded that the Act does not create

substantive rights enforceable under 42 U.S.C. Section 1983. The Fourth Circuit reached the same conclusions in Hunt v. Robeson County Department of Social Services, 816 F.2d 150, 152 (4th Cir. 1987). In reaching these conclusions, this Court rejected the reasoning of the Eighth Circuit which found support in the Act for an implied original right of action and the existence of rights enforceable under Section 1983. Crawford v. Janklow, 733 F.2d 541 (8th Cir. 1984).

The Association's attempts to distinguish its present challenge from its challenges in LIHEAP II are unpersuasive. The clear and unambiguous decision in LIHEAP II controls the outcome in this case. The holding applies to the Act in its entirety, so the argument that the outcome here should

be different because a different section of the Act is involved is without merit. There is nothing in the record indicating that the plaintiffs have pursued their administrative remedies. The Association argues that the available administrative process is inadequate to challenge the complete denial of eligibility. Joint App. at 13-15. However, because we are without jurisdiction, the plaintiffs are left to their state administrative remedies under Section 8624(b)(13). The plaintiffs may also challenge Kentucky's alleged maladministration of the program pursuant to Section 8627(a)(2) by filing a complaint with the Secretary of HHS. The Secretary is required to respond to the complaint and withhold funds from "any State which does not utilize its allotment substantially in accordance

with the . . . assurances such State provided under Section 8624." 42 U.S.C. Section 8627(a)(1).

III.

Accordingly, the District Court's dismissal of the Association's complaint is AFFIRMED.

January 19, 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

CIVIL ACTION NO. 91-78

NORTHERN KENTUCKY WELFARE RIGHTS ASSOCIATION, ET AL., PLAINTIFFS

VS.

WALLACE G. WILKINSON, ET AL. DEFENDANTS

ORDER

The Court has considered the memoranda of record on the issues identified in the Court's Order dated November 15, 1991. [Record Nos. 59-60]. More importantly, the Court has considered the fresh decision of the United States Court of Appeals for the Sixth Circuit in Cabinet for Human Resources v. Northern Kentucky Welfare Rights Association, No. 91-5122 (6th Cir. Decided January 24, 1992), a decision

finding that the Low Income Home Energy Assistance Act of 1981, 42 U.S.C. Sections 8621 - 8629, implies no private right of action prior to exhausting state remedies and that the Act creates no independent rights enforceable in federal court under 42 U.S.C. Section 1983.

Accordingly, it is ordered that the above-styled cause be, and the same hereby is, DISMISSED and STRICKEN FROM THE DOCKET. It is further ordered that the entry of this Order be stayed until the mandate issues in Sixth Circuit No. 91-5122.

This 28th day of April, 1992.

JOSEPH M. HOOD
JOSEPH M. HOOD, JUDGE

Date of Entry and Service:

Candy A. Culin
Carl J. Melcher
Anthony G. Martin
Ryan M. Halloran/
Sandra E. Downs-Arnold
David A. Bratt
1-29-92 sm

3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

CIVIL ACTION NO. 91-78

NORTHERN KENTUCKY WELFARE RIGHTS ASSOCIATION, ET AL., PLAINTIFFS

VS.

WALLACE G. WILKINSON, ET AL. DEFENDANTS

ORDER

The mandate of the Sixth Circuit having issued in Frankfort Civil Action No. 90-71, a parallel action,

IT IS ORDERED that the above-styled cause be, and the same hereby is DISMISSED and STRICKEN FROM THE DOCKET.

This the 14th day of April, 1992.

JOSEPH M. HOOD
JOSEPH M. HOOD, JUDGE

Date of Entry and Service:

CABINET FOR HUMAN RESOURCES
COMMONWEALTH OF KENTUCKY,
Plaintiff-Appellant,

v.

NORTHERN KENTUCKY WELFARE
RIGHTS ASSOCIATION,
Defendant-Appellee.

No. 91-5122.

United States Court of Appeals,
Sixth Circuit.

Argued Sept. 20, 1991.

Decided Jan. 24, 1992.

State agency brought declaratory judgment action against the Secretary of Health and Human Services, seeking approval of its procedures for distributing block grants to assist in payment of home energy costs of low income persons. Low income tenants association intervened and was substituted as party. The United States District Court for the Eastern District

of Kentucky, William O. Bertelsman, Chief Judge, granted declaratory relief in favor of tenants association and appeal was taken. The Court of Appeals, Merritt, Chief Judge, held that: (1) there was no original implied right of action in Act, prior to exhausting state administrative remedies, and (2) Act conferred no rights upon which Section 1983 action could be based.

Reversed.

1. Action 3

When determining whether there is implied right of action under federal statute, congressional intent is of primary importance.

2. Action 3

Low Income Home Energy Assistance Act did not provide low income persons receiving energy cost assistance with an implied original right of action to receive benefits; Act placed

responsibility for administration of energy subsidy program almost entirely in hands of the state, Congress intended for states to establish state administrative remedies allowing tenants to contest errors in calculation of their benefits, and implying original federal remedy would be inconsistent with legislative scheme of home energy grant program. Omnibus Budget Reconciliation Act of 1981, Sections 2602-2610, as amended, 42 U.S.C.A. Sections 8621-8629

3. Civil Rights 108

Violations of rights, privileges, or immunities secured by federal statutory law as well as consitutional law are actionable under Section 1983. 42 U.S.C.A. Section 1983.

4. Civil Rights 108

In passing Low Income Home Energy Assistance Act, Congress did not intend to confer private rights enforceable

under Section 1983; participation in block grant program was voluntary on parts of state, and there was a pervasive emphasis on maintaining limited federal role. 42 U.S.C.A. Section 1983.

Maria T. Geisler (argued & briefed), Cabinet for Human Resources, Com. of Ky., Sandra E. Downs (briefed), Frankfort, Ky., for plaintiff-appellant.

Carl J. Melcher (argued), Northern Kentucky Legal Aid Soc., Inc., Covington, Ky., Anthony G. Martin (briefed), Kentucky Legal Services Program, Lexington, Ky., for Northern Kentucky Welfare Rights Assn., Diane Mills and Salina Murdock.

Before MERRITT, Chief Judge, KENNEDY, Circuit Judge, and McRAE, Senior District Judge.*

MERRITT, Chief Judge.

This case raises questions concerning the availability of federal judicial review for claims under the Low Income Home Energy Assistance Act of 1981, 42 U.S.C. Sections 8621-8629. The Act authorizes a program of federal-state block grants to assist eligible households in meeting the costs of home energy and requires a set of state administrative remedies for aggrieved

*The Honorable Robert M. McRae, Senior District Judge for the United States District Court for the Western District of Tennessee, sitting by designation.

tenants.[1] The Commonwealth of Kentucky applied for and received funds through the program and established a scheme of administrative relief. Kentucky adopted the "Model Plan" offered by the federal Department of Health and Human Services for distributing the energy subsidies and designated the state Cabinet for Human Resources as the agency to implement the Plan.

Anticipating a legal challenge to its method of calculating an eligible household's subsidy level under the Act, the Cabinet filed suit in District Court

1. The state must "provide an opportunity for a fair administrative hearing to individuals whose claims for assistance ... are denied...." 42 U.S.C. Section 8624(b)(13).

seeking declaratory relief that the Kentucky Plan conformed to the requirements of the Act. The complaint named as defendant the Secretary of Health and Human Services, Dr. Louis W. Sullivan. The Northern Kentucky Welfare Association ("the Association") entered the suit on the side of the defendant. Under the Kentucky Plan, the Association claimed, the Commonwealth unlawfully discriminated against tenants of publicly subsidized housing when calculating a household's subsidy level. The Association did not seek to exhaust state administrative remedies, but filed a class counterclaim seeking declaratory and injunctive relief. The federal defendant was dismissed from the action leaving only the Cabinet as plaintiff and the Association as defendant and counter claimant.

The District Court granted declaratory relief in favor of the Association and enjoined the Cabinet from using the amount of energy costs allowed tenants in public housing as a factor in calculating the amount of benefits allocated to eligible families. We now dissolve the injunction and dismiss this action because we find that the Act implies no private right of action prior to exhausting state administrative remedies and that the Act creates no independent rights enforceable in federal court under 42 U.S.C. Section 1983.

I.

The Low Income Home Energy Assistance Program created by the Act is a voluntary federal-state grant program. The Act authorizes the Secretary of HHS to grant funds to states to assist low income households in meeting the costs of

home energy, but does not create an entitlement program. States receive a lump sum to be distributed to eligible households. Unlike entitlement programs, once that sum is depleted no more subsidies will be awarded regardless of an applicant's eligibility or need.

To receive program funds, a state must submit to the Secretary an application that contains a plan detailing the manner in which the state will distribute grant funds. 42 U.S.C. Section 8624(c)(1). The language of the Act does not use the customary "shall" language of entitlement laws that is generally recognized to mandate certain behavior. Instead, the Act requires a state applicant to give "assurances," Section 8624(a), or to "certify," Section 8624(b), that it will use its allotted funds for purposes specified. The Act also requires the Secretary to make a

model state plan format available to the states that each state may use to prepare its application. Section 8624(c)(3). The states must conduct public hearings with respect to their proposed distribution of funds, Section 8624(a)(2), and also make each plan and any substantial revisions available to the public for inspection and comment. Section 8624(c)(2).

The Act's directives for state administration of the subsidy program are general in nature. The Act establishes an eligibility scheme in terms of household income levels. Participating states are to distribute funds to eligible households so that the highest level of assistance is given to households with the lowest incomes and the highest costs in relation to income. Section 8624(b)(5). The Act does not prescribe a method of calculating actual

benefits, but to receive funds a state must assure the Secretary that it will not distinguish between those households already receiving other public welfare benefits and those low income households that do not receive other benefits. Section 8624(b)(8). The Act also states that subsidies received through the grant program should not be considered income or resources of the recipient for any purpose under state or federal law. Section 8624(f)(1).

The language in the Act, though not conclusive, indicates that Congress intended to minimize federal involvement in the administration of the subsidy program. For example, Section 8624(b) states that the "Secretary [of HHS] may not prescribe the manner in which the States will comply" with the central, substantive provisions of the Act. Although conditions attach to the receipt

of grant funds and the Secretary must approve the initial disbursement of grant funds to qualifying states, the Act envisions a very limited federal role in the actual distribution of the funds to eligible recipients.

This general overriding proposition of limited federal involvement is an important feature of the energy subsidy program. It is against this backdrop that we must evaluate the role Congress intended for the federal courts in enforcing a state's compliance with the conditions set forth in the Act.

The dispute in the present case concerns Kentucky's method of calculating a household's energy costs in order to determine its subsidy level. The Association claims that the calculation of individual benefits under the Cabinet's Plan violates certain

provisions of the Act. The Association represents members who are residents of subsidized public housing. The two individually named claimants, Diane Mills and Salina Murdock, are members of the Association's leadership committee. In its class action challenge to the Cabinet's administration of the energy subsidy program, the Association claims that Kentucky's method for calculating benefit levels unlawfully uses the amount of energy costs allowed tenants in public housing, fails to treat owners and renters equitably, and does not provide the highest benefits to applicants with the lowest incomes and highest costs in relation to income.

The District Court determined that by considering these other energy subsidies, the Cabinet violated Section 8624(f)(1), which states that home energy assistance payments or allowances under

the Act should not be considered income or resources of the household for any purpose under federal or state law. The District Court accepted the Association's argument that the state may not reduce energy payments under the Act when the claimant is also receiving an energy subsidy as a part of the claimant's monthly public housing assistance. Finding this issue to be dispositive, the Court did not rule on the Association's other claims.

The District Court relied on the Eighth Circuit's decision in Clifford v. Janklow, 733 F.2d 534 (8th Cir. 1984). In Clifford, the Court found that Section 8624(f)(1)2 "clearly prohibits the states from reducing a household's entitlement to other forms of public

2. Formerly Section 8624(f).

assistance based on its receipt of [federal funds under the energy subsidy program]" and that it also "evinces Congress's intent to prevent the states from achieving the same net effect by the opposite method, . . . reducing the [federal energy subsidy] grant based on the applicant's receipt of other forms of public assistance." Id. at 537.

The Cabinet argues that the District Court's holding was inappropriate because no private right of action is implied in the Act and because the Act creates no substantive rights enforceable under 42 U.S.C. Section 1983. The Association asserts that its members do have an implied private right of action under the Act and asserts that the Act crates substantive rights in eligible recipients that are enforceable under Section 1983. The district Court's order does not discuss the basis for finding

that the Association has a private right of action against the Cabinet, but proceeds directly to the merits of the case. We presume that the Court adopted by reference the conclusion of the Eighth Circuit in Crawford v. Janklow, 733 F.2d 541 (8th Cir. 1984), a predecessor to Clifford in which the Court found support for implying a private right of action under the Act and for the existence of rights enforceable under Section 1983. We are unpersuaded by the Eighth Circuit's reasoning in Crawford. We disagree that the Act authorizes a private right of action prior to exhausting state administrative remedies. We also disagree that the Act creates rights enforceable under Section 1983. We thus find it unnecessary to reach the merits of the question as to whether Kentucky's method of distributing federal funds under the Plan violates the Act.

II.

The Act does not expressly provide for a private right of action. Claimants may state a federal claim only if they have an implied private right of action under the Act or if they have a cause of action under 42 U.S.C. Section 1983.

A.

[1,2] When determining whether there is an implied right of action under a federal statute, congressional intent is of primary importance. Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1, 13, 101 S.Ct. 2615, 2622-23, 69 L.Ed.2d 435 (1981); Withworth Bros. Storage Co. v. Central States, Southeast and Southwest Areas Pension Fund, 794 F.2d 221, 228 (6th Cir. 1986). In Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), the Supreme Court set forth a series of

standards to determine whether a private remedy is implicit in a federal statute even when Congress did not expressly provide for one:

(1) Is the Plaintiff one of the class for whose special benefit the statute was enacted?

(2) Did Congress indicate any intent either to create or deny a remedy?

(3) Would implying a remedy for the plaintiff be consistent with the underlying purpose of the legislative scheme?

(4) Would the cause of action be one traditionally delegated to state law such that it would be inappropriate to imply a federal remedy?

Courts routinely have applied these standards to establish the existence of an implied right of action. As this Court noted in Withworth, however, the purpose of the inquiry is

merely to discern legislative intent. Withworth, 794 F.2d at 229. Applying the Cort test to the statute at issue, we perceive no indication that Congress intended to create a private remedy for beneficiaries under the Act.

First, although we agree with the Association that its members are among those whom Congress intended the Act to benefit, to satisfy the first prong of the Cort test we must also find that congress "intended to confer federal rights upon these beneficiaries." California v. Sierra Club, 451 U.S. 287, 294, 101 S.Ct. 1775, 1779-80, 68 L.Ed.2d 101 (1981). The Court in Sierra Club further instructs us that we should first look to the language of the Act to ascertain this intent. Id.

The Act places responsibility for administration of the energy subsidy program almost entirely in the hands of

the state. Despite the general directives contained in the statute, it confers upon the state great latitude in developing a distribution scheme. For example, the Act instructs participating states only to set aside "a reasonable amount" of grant funds for energy crisis intervention. Section 8623(c). Conceivably, the state could set aside its entire allotment for crisis intervention and not offer general subsidies in any form. As mentioned previously, the Act does not create an entitlement program; a state may exhaust its funds before some of its neediest families receive any benefit at all, yet this clearly would not constitute a violation of the statute. The Act also specifically limits the degree to which the Secretary can dictate the method by which a state must comply with the Act. Section 8624(b). Finally, the remedial

scheme envisioned by the statute focuses on state administrative remedies. Section 8624(b)(13). These characteristics of the home energy assistance program are inconsistent with a finding that Congress intended to confer an enforceable federal right on potential beneficiaries.

Second, we find that Congress did not intend to create a federal cause of action, but instead intended for the states to establish state administrative remedies allowing tenants to contest errors in the calculation of their benefits. Although the statute is ambiguous on this point, an examination of the limited remedial scheme found in the Act supports our conclusion. Congress expressly provided for three types of relief for aggrieved claimants: (1) claimants may complain directly to the Secretary who must investigate all

complaints of a substantial or serious nature and withhold funds if a state has failed to use funds in a manner consistent with the requirements of the Act, Section 8627; (2) if the secretary determines that a state has violated the nondiscrimination provisions of the Act, he may refer the matter to the Attorney General and recommend that a civil suit be instituted, Section 8625; and (3) an aggrieved claimant must be provided by the state with "a fair administrative hearing" when the claim is denied or not acted on promptly, Section 8624(b)(13). Pursuant to the requirement that a participating state provide an administrative forum, Kentucky claimants have the right to request and receive "a fair administrative hearing" for claims under the Act, 904 Ky.Admin.Regs. 2:116 Section 6, and to seek judicial review under the commonwealth's administrative

process, 904 Ky.Admin.Regs. 2:055. The claimants here have not sought to exhaust these remedies.

Although claimants may channel complaints through the Secretary, the statute expressly provides for legal action to be initiated by a beneficiary only through a state administrative action. The two purely federal remedies provided in the Act do not purport to give a claimant standing to sue in federal court or provide federal jurisdiction to review benefits, hear class actions, or award declaratory relief on behalf of claimants.

We disagree with the Association that a private right of action in federal court is necessary to complete the scheme of equitable distribution of energy subsidies envisioned by this statute. Congress did leave an avenue for private enforcement, but it did so through state

administrative action and not through the federal courts in the form of an original action. "When [a] statute specifically provides certain remedies the courts should not expand the statute to encompass other remedies." Withworth, 794 F.2d at 230 (citing Cort). The claimants here have not exhausted the avenues for administrative relief and until they do, we find it unnecessary to complete the inquiry as to whether a private right of action is implied in the Act.

In Crocker v. Tenn. Secondary School Athletic Ass'n, 873 F.2d 933, 935 (6th Cir. 1989), we discussed the rationale for requiring plaintiffs to exhaust administrative remedies before bringing a case under the Education of the Handicapped Act, 20 U.S.C. Section 1415(e), in federal court:

The policies underlying this exhaustion requirement are both sound and important. States are given the power to place themselves in compliance with the law, and the incentive to develop a regular system for fairly resolving conflicts under the Act. Federal courts-generalists with no expertise in the educational needs of handicapped students-are given the benefit of expert factfinding by a state agency devoted to this very purpose.... Were federal courts to set themselves up as the initial arbiters of handicapped children's educational needs before the administrative process is used, they would endanger not only the procedural but also the substantive purpose of the Act. And both states and the federal government have a recognized interest in providing

enforcement of the Act that is not only just but efficient. (citations omitted).

We find this reasoning equally persuasive in the present case.

The substance of the complaint in this case requires review of the actual calculations made by the agency administering the energy subsidy program. Although the amounts at issue cumulatively may be great, by asking us to imply a right of action, the claimants are asking us to confirm the right of individuals who may benefit under the Act to file claims in federal court for disputes over very small amounts arrived at through detailed highly localized procedures. We find no strong federal interest in what amounts to adjudicating monthly energy bills. We can think of no welfare benefits program where beneficiaries can sue directly in

federal court without first engaging the administrative process. If we are to consider claims under the Act at all, we hesitate to do so with the benefit of an administrative record. Thus we find that the Act does not satisfy the second prong of the Cort test. Despite any ambiguity in the statute as to the intent of Congress to create or deny a remedy, we find the argument that Congress intended to create only a limited avenue for relief more persuasive than the assertion that claimants should be able to bring highly localized disputes over small sums into federal court.

Third, we find that implying an original federal remedy for the plaintiff would be inconsistent with the legislative scheme of the home energy grant program. We disagree with the Association that a private right of action in federal court is necessary to

complete the scheme of equitable distribution of energy subsidies envisioned by the Act. Limiting the avenues for relief to state forums is consistent with the overall structure of the energy subsidy program as described above. It is important to remember that Congress drafted the statute against a background of minimal federal involvement. The Act as a whole suggests that Congress erected the framework for a relatively autonomous, state-administered, nonentitlement subsidy program. Congress restricted federal participation, but retained limited federal oversight. Thus, while the Secretary may not casually interfere with a state's administration of the program, states must work within the statutory framework or lose the right to participate.

In sum we hold that claimants have no implied original right of action under the Act. The fourth factor of the Cort test is not at issue because the complaint arises under a federal act and thus is not an area traditionally left to the states.

B.

[3] Violations of rights, privileges, or immunities secured by federal statutory law as well as constitutional law are actionable under 42 U.S.C. Sect. 1983. Maine v. Thiboutot, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980). There are two limitations, however, to the broad application of Sect. 1983 to alleged violations of federal statutes. First, Congress must not have foreclosed private enforcement in the enactment of the statute itself, and second, the statute must create substantive, enforceable

rights. Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 28, 101 S.Ct. 1531, 1545, 67 L.Ed.2d 694 (1981).

[4] The Supreme Court has held that Congress forecloses private enforcement under Sect. 1983 if the statute at issue creates a comprehensive enforcement scheme. Middlesex County Sewerage Authority v. Nat'l Sea Clammers, 453 U.S. 1, 14, 101 S.Ct. 2615, 2623, 69 L.Ed.2d 435 (1983). Courts have compared the inquiry as to whether a statute creates substantive, enforceable rights to the analysis under Cort v. Ash for the existence of an implied cause of action. See, e.g., Crawford v. Janklow, 710 F.2d 1321, 1326 (8th Cir. 1983); Boles v. Earl, 601 F.Supp. 737, 742 (W.D.Wisc. 1985). Although the Association argues that the enforcement scheme set forth in the statute is not sufficiently elaborate

to find that Congress foreclosed private enforcement in the enactment of the statute itself, we disagree with their assessment of the administrative relief available under the Act. As we have pointed out above, it appears that Congress intended that claimants exhaust a set of state administrative remedies before any attempt to seek federal judicial remedies.

We also agree with the Fourth Circuit in Hunt v. Robeson County Dep't of Social Services, 816 F.2d 150, 152 (4th Cir. 1987), that the Act does not create substantive rights so as to give the claimants a cause of action under Sect. 1983. In Hunt, the Fourth Circuit characterized the Act as "a mere federal-state funding statute, which gives actual assistance to the States and only indirect benefits to qualified households." Id. at 153 (footnote

omitted). Relying on the Supreme Court's decision in Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981), the Court found that the language of the Act is too indefinite to create enforceable rights in eligible recipients of the funds. Hunt, 816 F.2d at 153. Therefore, the Court concluded, the Act is not enforceable under Sect. 1983.

In contrast to Hunt, the Eighth Circuit, also citing Pennhurst for authority, held that the Act does create substantive rights enforceable by qualified recipients under Sect. 1983. Crawford v. Janklow, 710 F.2d 1321 (8th Cir.1983). The Eighth Circuit also found that the remedial scheme set forth in the Act is inadequate to protect the interests of targeted beneficiaries and, as such, is not an exclusive remedy that should foreclose enforcement of the Act

under Sect. 1983. See also Boles v. Earl, 601 F.Supp. 737 (W.D.Wisc. 1985) (following Crawford in holding that plaintiffs have cause of action under Sect. 1983 for alleged violations under the Act).

As noted, the Courts in each of these cases relied on the Supreme Court's decision in Pennhurst as authority for their holdings. In Pennhurst the Court held that the "bill of rights" provision of the Developmentally Disabled Assistance and Bill of Rights Act ("Disabled Assistance Act") did not create substantive rights in favor of the mentally retarded that are enforceable under Sect. 1983. The Court found important to its evaluation the fact that the program created under the Disabled Assistance Act was a voluntary federal-state cooperative program and that states could choose between complying with the

conditions set forth in the Act or foregoing the benefits of federal funding. The Court found support in the language of the Disabled Assistance Act, including a statement that the purpose of the Act was "to assist the states to assure that persons with developmental disabilities receive [appropriate care]" and language preceding the bill of rights stating that each state shall as a condition of receiving assistance "provide the Secretary satisfactory assurances" that certain steps would be taken to protect the interests of the state's developmentally disabled population. Pennhurst, 451 U.S. at 11-13, 101 S.Ct. at 1536-38. The Court noted that Congress is aware of the distinction between encouraging and mandating specific conduct, and knows how to impose binding obligations on a state when it wishes to do so. Id. at 27, 101 S.Ct. at

1544-45. If anything, the Court concluded, plaintiffs "can only claim that the state plan has not provided adequate 'assurances' to the Secretary" because that is all the Disabled Assistance Act requires the State to do. Id. at 28, 101 S.Ct. at 1545.

The Association tries to distinguish Pennhurst from the present case by arguing that Sect. 8624(f) of the Act creates an unequivocal obligation on the part of the State not to count funds received under the energy subsidy program as income for any purpose under state or federal law. The Association argues that this provision indicates that Congress intended to impose obligations on the states and not merely to express preferences. The Association's position here is undercut by the fact that Sect. 8624(f) stands alone as an obligation under the Act. It is listed separately

from the other sections issuing general directives for implementation of the plan, which the Association would characterize as mandatory obligations on the Commonwealth, but which we conclude reflect only congressional preferences.

Even if Sect. 8624(f) is enforceable, as the Association suggests, it merely disallows any benefit that accrues to a household under the Plan to affect that household's other benefits or entitlements. Section 8624(f) is triggered only by operation of another statute. For example, if a governmental agency calculates a household's income to include payments received under the Act so that household then receives a lesser allotment of food stamps than it would otherwise be entitled to receive, the recipient will have an action, either judicial or administrative, under the food stamps statute. A household's

ability to enforce this section, therefore, is limited to mechanisms for enforcing the entitlement statute under which its affected benefits are calculated and not necessarily under the Act.

The Association also argues that the benefit that accrues to the members of the Association is sufficiently specific and definite to qualify as an enforceable right and that the remedial scheme under the Act is insufficient to foreclose enforcement through Sect. 1983. The Association argues that the Act is more closely related to the statute upheld as creating enforceable rights for its beneficiaries in Wright v. Roanoke Redevelopment and Housing Authority, 479 U.S. 418, 107 S.Ct. 766, 93 L.Ed.2d 781 (1987), than the statute in Pennhurst.

In Wright, tenants living in low-income housing projects brought suit

under Sect. 1983 claiming violation of the Brooke Amendment to the Housing Act of 1937. The Brooke Amendment imposed a ceiling on the amount of rent to be paid by tenants of low-income housing projects defined as a percentage of household income. Id. at 420, 107 S.Ct. at 768-69. The Department of Housing and Urban Development ("HUD") consistently, before and after the amendment to the Housing Act, interpreted rent to include a reasonable amount for utilities. Id. at 420, 107 S.Ct. at 768-69. Plaintiffs alleged that the defendant over-charged them for their utilities under the applicable HUD regulations by exceeding the ceiling on the amount of rent that each household was required to pay. The Supreme Court reversed the holding of the Court of Appeals that the plaintiffs had no cause of action under Sect. 1983. The Supreme Court found that the Brooke

Amendment, in conjunction with the longstanding HUD regulations, creates an enforceable right in favor of tenants with respect to a utilities allowance. The Court found that a provision for a "reasonable" allowance for utilities was not too vague to be enforceable since the HUD regulations defined rent as including utilities and such regulations have the force of law. The Court found the remedial scheme insufficient to indicate a congressional intent to supplant a Sect. 1983 remedy because the only relief available to tenants was a localized grievance procedure. The Court noted that no formal procedure existed for tenants to direct their complaints to HUD.

On the surface, the statute in Wright bears a great deal of similarity to the one at issue in this case. Both statutes are public welfare measures that

concern residents of public housing. Both statutes have limited remedial schemes that provide essentially localized relief through a state administrative scheme with local administrative machinery. Although commonality exists between the two statutes, however, we find that the common elements are greatly overshadowed by distinctions that exist.

Three general themes in the Act persuade us that Congress did not intend to confer private rights enforceable under Sect. 1983 and, therefore, that this Act is more like the statute in Pennhurst than the statute in Wright. First we note the voluntariness aspect; states are not required to participate in the energy subsidy program and can choose to forego the benefit altogether. In keeping with this acknowledgement of state autonomy, the primary method of

penalizing states for failure to substantially comply with the provisions of the Act is for the Secretary to withhold funds. 42 U.S.C. Sect. 8627. Unlike the statute in Wright, however, the Act mandates that the Secretary investigate complaints regarding the administration of the Plan. Sect. 8627. One of the problems noted in Wright was that HUD was unresponsive to citizen complaints and infrequently used its audit authority to assure compliance by the states. No such allegations have been made in this case. The second important feature of the Act is the pervasive emphasis on maintaining a limited federal role. Finally, like the statute in Pennhurst the Act speaks in terms of giving assurances of compliance with the general directives for dispersal of the subsidies. Although the Act sets forth a series of requirements for the

administration of the Plan, the language is not the type that Congress generally uses when it wishes to impose a rigid code of conduct. The Act has the state "give assurances" that the state will meet the established conditions. The Act has the chief executive officer of the state "certify that the State agrees to" the conditions. In Pennhurst, the Supreme Court determined that similar language in the Disabled Assistance Act did not create any substantive rights in favor of the mentally retarded. As in the Disabled Assistance Act at issue in Pennhurst, if the members of the Association have any claim at all under the Act, it is merely that the Commonwealth failed to provide adequate assurances to the Secretary and not that the Act is improperly administered.

The language of the Act is contractual in tone and correspondingly

suggests a contractual type relationship between the state and the federal government; as noted in Pennhurst "in return for federal funds, the states agree to comply with federally imposed conditions." 451 U.S. at 17, 101 S.Ct. at 1540. Although the claimants may benefit from the federal-state relationship, the statute does not necessarily confer substantive rights as a result. As the Supreme Court stated in Pennhurst, "Congress... plainly [understands] the difference, financial and otherwise, between encouraging a specified type of treatment and mandating it." 451 U.S. at 27, 101 S.Ct. at 1545. Since we find that this is a situation in which Congress is suggesting instead of mandating, we find that the Association has no private right of action under Sect. 1983.

In sum we find that this statute is more akin to the statute in Pennhurst than in Wright and, therefore, that plaintiffs cannot sustain a private right of action under Sect. 1983.

Accordingly, the injunction issued by the District Court is dissolved, and its judgment, finding original federal jurisdiction to order relief against the state in connection with the award of benefits under the Act, is reversed.

NO. 90-6268

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NORTHERN KENTUCKY WELFARE RIGHTS ASSOCIATION, an unincorporated non-profit organization, MICHELLE RENE ASBURY, and DOLORES A. FLOOD, on their own behalf and on behalf of all others similarly situated,

Plaintiffs-Appellees

v. ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

WALLACE G. WILKINSON, Governor of the Commonwealth of Kentucky,

Defendant-Appellant

BEFORE: KRUPANSKY and MILBURN, Circuit Judges; and CONTIE, Senior Circuit Judge.

PER CURIAM. Defendant-appellant Wallace G. Wilkinson, Governor

of the Commonwealth of Kentucky, appeals the summary judgment and permanent injunction granted to plaintiffs-appellees, Northern Kentucky Welfare Rights Association, Michelle Asbury, and Dolores Flood, in this class action challenging Kentucky's administration of its Low-Income Heating and Energy Assistance Program.

Although two additional defendants were named in the complaint filed in the district court, only Governor Wilkinson has appealed since he is the only named defendant appearing on the notice of appeal. J.A. at 88-89. See Minority Employees of the Tennessee Dep't of Employment Secur. Inc. v. Tennessee Dep't of Employment Secur., 901 F.2d 1327 (6th Cir.) (en banc), cert. denied, 111 S. Ct. 210 (1990), and Torres v. Oakland

Scavenger Co., 487 U.S. 312 (1988). The other named defendants in the district court were Dr. Harry Cowherd, Secretary of the Kentucky Cabinet for Human Resources, and Mike Robinson, Commissioner of the Department of Social Insurance of the Kentucky Cabinet for Human Resources.

The principal issues in this appeal are (1) whether venue was proper in the Western District of Kentucky, (2) whether plaintiffs have a private right of action under 42 U.S.C. Sect. 8621-29 (the Low-Income Home Energy Assistance Act of 1981) or 42 U.S.C. Sect. 1983, (3) whether plaintiffs were unlawfully denied benefits by Kentucky's administration of its Low-Income Home Energy Act Program in violation of 42 U.S.C. Sect. 8624(b)(5), and (4) whether this case was moot on

August 30, 1990, when the district court entered summary judgment and issued its permanent injunction, and whether it is moot now. For the reasons that follow, we vacate the permanent injunction issued by the district court and remand with instructions to transfer this case to the Eastern District of Kentucky.

I.

The Low-Income Home Energy Assistance Act of 1981 (LIHEAA), 42 U.S.C. Sect. 8621-29, is a block grant program designed to provide states with federal funds to be used to assist certain low income households in meeting their energy needs. Kentucky receives funds under LIHEAA and distributes them to its residents through its Low-Income Home Energy Act Program (LIHEAAP).

Plaintiffs represent a class consisting of those Kentucky households that (a) have incomes below 110 percent of the federal poverty level and (b) do not include a person who is over sixty years of age or disabled. Plaintiffs filed this action against the defendants, all officials of the Commonwealth of Kentucky, because defendants created two components with LIHEAP, a subsidy component and a crisis component.

Approximately one-third of the $16 million the defendants received from the United States of America under the provisions of LIHEAA was allocated to the subsidy component. The subsidy component was designed to provide low income households containing elderly or disabled persons with subsidies to defray their energy costs, and only households

containing elderly or disabled members could apply for the subsidies offered by this component.

The remaining two-thirds of the funds received from the United States was allocated to the crisis component of LIHEAP. Under Kentucky's plan, the funds in the crisis component were to be paid directly to community agency committees, which in turn were directed to distribute them to low income households experiencing a home heating crisis, without regard to whether or not they contained elderly or disabled members.

Plaintiffs objected to this division of LIHEAA funds into two components because, being members of a class of households without elderly or disabled members, they could not qualify for any of the funds from the subsidy

component of the program. The legal theory underlying their action is that the defendants were, as a condition of receiving federal funds, required to agree with the United States to disburse those funds to their ultimate beneficiaries according to the provisions of 42 U.S.C. Sect. 8624(b)(5), which requires that each state certify to the Secretary of Health and Human Services that it agrees to

> (5) provide, in a timely manner, that the highest level of assistance will be furnished to those households which have the lowest incomes and the highest energy costs in relation to income, taking into account family size...

Plaintiffs argue that this statute does not permit the splitting of funds into two components where one of those components, the subsidy component, is not accessible to plaintiffs' class

members -- however low their incomes might be, however high their energy costs might be, and however large their families might be -- merely because their households do not contain an elderly or disabled member.

After this class action for declaratory judgment and injunction was filed in the district court for the Western District of Kentucky, defendants filed a motion under Federal Rule of Civil Procedure 12(b)(3) objecting to venue and moving the court either to dismiss the case or to transfer it to the Eastern District of Kentucky. The district court overruled the motion without an opinion. J.A. at 68. Thereafter, on December 8, 1989, the court issued a preliminary injunction ordering the defendants "to transfer

to the subsidy component of the LIHEAP program funds a sum equal to that amount which has already been set aside for that fund" and enjoining defendants "from prohibiting persons other than the elderly and disabled who are in need of fuel assistance costs from filing applications for assistance in meeting their energy costs under the subsidy component of the program." J.A. at 77. The court later modified its injunction to provide that the newly constituted subsidy component it had ordered into existence would be accessible only to qualified applicants whose households do not contain elderly or handicapped members. J.A. at 82. On August 30, 1990, the district court granted summary judgment to the plaintiffs and made its preliminary injunction permanent. J.A. at 87.

II.
A.

Defendant first argues that the district court should have granted his motion under 28 U.S.C. Sect. 1406(a) to dismiss the case or transfer it from the Western District of Kentucky to the Eastern District of Kentucky because venue was improper in the Western District. A district court's ruling on matters of venue are reviewed for abuse of discretion. Hapaniewski v. Chicago Heights, 883 F.2d 576, 579 (7th Cir. 1989), cert. denied, 110 S.Ct. 1116 (1990); Cote v. Wadel, 796 F.2d 981, 985 (7th Cir. 1986); Naarte Consulting Corp. v. Watt, 722 F.2d 779, 789 (D.C. Cir. 1983), cert. denied, 467 U.S. 1210 (1984). Under this standard, a reviewing court will not set aside a judgment

"unless it has a definite and firm conviction that the court below committed a clear error of judgment ...." Balani v. Immigration and Naturalization Serv., 669 F.2d 1157, 1160 (6th Cir. 1982) (per curiam).

The parties agree that venue in this case is determined by 28 U.S.C. Sect. 1391(b) which at the time this action was filed provided:

> (b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

This statute contains two elements. The first, "where all defendants reside," would establish venue in the Eastern District of Kentucky under this court's holding in O'Neill v. Battisti, 472 F.2d

789 (6th Cir. 1972) (per curiam), cert. denied, 411 U.S. 964 (1973). In Battisti this court held that the official residence of the justices of the Supreme Court of Ohio was the place where the justices performed their official duties, the state capital, and that 28 U.S.C. Sect. 1391(b) required that venue be in the district containing the state capital whenever state officials were sued in their official capacities. Upon finding that the justices had been sued in the wrong district, this court directed the district court to dismiss the action for lack of venue. See Andrew H. V. Ambach, 579 F.Supp. 85, 88 (S.D.N.Y., 1984); Weil v. New York State Dep't of Transp., 400 F. Supp. 1364, 1365 (S.D.N.Y. 1975) (following Battisti). Since the parties agree that the official residence of all

the defendants below in this action is the state capital, Frankfort, which is in the Eastern District of Kentucky, venue would be proper there and improper in the Western District under the first element of 28 U.S.C. Sect. 1391(b).

The second element of 28 U.S.C. Sect. 1391(b) provides for venue "where the claim arose." Some courts have narrowly construed section 1391(b) to allow venue in the district where the claim arose only when multiple defendants do not reside in the same judicial district; i.e., when the first element of section 1391(b) cannot be applied. Canady v. Koch, 598 F.Supp. 1139, 1148 (E.D.N.Y. 1984), aff'd, 768 F.2d 501 (2d Cir. 1985); Southern Marine Research, Inc. v. Jetronic Indus., Inc., 590 F.Supp. 1192, 1194 (D.Conn. 1984); Pfeiffer v.

International Academy of Biomagnetic Medicine, 521 F.Supp. 1331, 1336 (W.D. Mo. 1981). However, as the statute is phrased in the alternative, it is appropriate to consider "where the claim arose" in this case.

The leading case interpreting the language, "where the claim arose," is Leroy v. Great Western United Corporation, 443 U.S. 173 (1979). In Leroy, the Court was faced with deciding whether venue was proper in the Northern District of Texas or in the District of Idaho. After noting that the "first test of venue under [section 1391(b)] -- the residence of the defendants -- obviously points to Idaho rather than Texas," 443 U.S. at 183, the court went on to consider the "where the claim arose" element and held that

> the broadest interpretation of the language of Sect. 1391(b) that is even arguably acceptable is that in the unusual case in which it is not clear that the claim arose in only one specific district, a plaintiff may choose between those two (or conceivably even more) districts that with approximately equal plausibility -- in terms of the availability of witnesses, the accessibility of other relevant evidence, and the convenience of the defendant (but not of the plaintiff) -- may be assigned as the locus of the claim.

Id., 433 U.S. at 185 (footnote omitted)

This language has been interpreted to mean that the court should use a "weight of the contacts" test to determine where the claim arose. In Broadcasting Company of the Carolinas v. Flair Broadcasting Corporation, 892 F.2d 372, 376 (4th Cir. 1989), the Fourth Circuit adopted the "weight of the contacts" test, which it defined as follows:

> Under the "weight of the contacts" test, venue would be proper in the district having the most significant ties to the claim. Although the Supreme Court did not expressly endorse the "weight of the contacts" test in Leroy, it appears that this test was applied in that case..

In Delong Equipment Company v. Washington Mills Abrasive Company, 840 F.2d 843, 855 (11th Cir. 1988), cert. denied, 110 S.Ct. 1813 (1990), the Eleventh Circuit adopted the "weight of the contacts" test, which it defined as establishing "venue in the district where the contacts weight most heavily."

The defendant argues that the weight of the contacts places venue in the Eastern District of Kentucky because all the defendants below officially reside there, because the seat of state government is located there, because the Kentucky program is established and

operated from that district, because the records and other relevant evidence concerning the program are maintained there, and because most of the witnesses knowledgeable about the program are located in the state capital in that district. The plaintiffs argue that one of the named plaintiffs resides in the Western District of Kentucky and that, because the LIHEAP program will have a substantial impact in the Western District of Kentucky due to the large number of potential recipients in that district, venue is proper there.

We believe that the Eastern District of Kentucky has the greater weight of the contacts with the plaintiffs' claim in this case. As defendant points out, it is the place where Kentucky's government formulates

its program in a series of administrative and legislative procedures. The program is coordinated, operated, and overseen from that district. It is where the assurances necessary to obtaining approval from the United States Department of Health and Human Services are given.

Plaintiffs argue that the Western District has the greater weight of contacts because the program has a substantial impact in that district. According to plaintiffs' statistics, Jefferson County, located in the Western District, has the highest number of low income households of any county in the state. This analysis, however, ignores the Supreme Court's disapproval of venue selection based only on a statute's impact.

> We therefore reject the Court of Appeals' reasoning that the "claim arose" in Dallas because that is where Great Western proposed to initiate its tender offer, and that is where Idaho's statute had its impact on Great Western. Aside from the fact that these "contacts" between the "claim" and the Texas District fall far short of those connecting the claim in the Idaho District, we note that this reasoning would subject the Idaho officials to suit in almost every district in the country.

Leroy, 443 U.S. at 186 (emphasis added).

The cases relied upon by plaintiffs, Florida Nursing Home Association v. Page, 616 F.2d 1355 (5th Cir. 1980), rev'd on other grounds sub nom. Florida Dep't of Health and Rehabilitative Servs. v. Florida Nursing Home Ass'n., 450 U.S. 147 (1981), and Michigan State Chamber of Commerce v. Austin, 577 F.Supp. 651, rev'd on other grounds, 788 F.2d 1178 (6th Cir. 1986), are inapposite because they held that

venue was proper in districts in which a statute had an impact. The location of a statute's impact might be one of the factors weighed in the scales when determining "weight of the contacts," but, as is apparent from the Court's treatment of this factor in Leroy, it is not a particularly weighty consideration.

Plaintiffs also argue that this court's decision in Onderik v. Morgan, 897 F.2d 204 (6th Cir. 1989), supports their position that the "substantial contacts" test is suitable for venue determinations under the "where the claim arose" component of section 1391(b). Although this court did quote Sutain v. Shapiro and Lieberman, 678 F.2d 115, 117 (9th Cir. 1982), to the effect that venue was proper in "any district in which a substantial part of the acts, events or

omissions occurred ...., "Onderik, 897 F.2d at 207, the court recognized that the Supreme Court had posited a "weight of the contacts" test in Leroy, and this court applied that test in deciding Onderik.

Even assuming arguendo that the weight of the contacts was evenly distributed to both the Eastern and Western Districts of Kentucky, the Court's decision in Leroy dictates that the proper venue in this case is in the Eastern District of Kentucky because that is the most convenient venue. When a claim can be considered as having arisen in more than one district -- an "unusual case" -- venue is to be selected "in terms of the availability of the witnesses, the accessibility of other relevant evidence, and the convenience

of the defendant (but not of the plaintiff) ...." Leroy, 443 U.S. at 185. All of those factors favor the Eastern District of Kentucky, and the plaintiffs' convenience is to be ignored.

In summary, under either component of section 1391(b), venue in this case was proper only in the Eastern District of Kentucky. That is where all of the defendants below have their official residences; it is the district most convenient to the defendants; and it is the district which has the weightiest contacts with the plaintiffs' claim. Under these circumstances, we hold that the district court abused its discretion in overruling defendants' motion to dismiss or transfer this case to the Eastern District of Kentucky.

B.

As we have determined that the Western District of Kentucky is not the proper venue, and that the proper venue is the Eastern District of Kentucky, we need not determine the other issues raised in this appeal. As the district court in the Eastern District of Kentucky to which this matter is assigned will decide the other issues in the plaintiffs' class action, we shall vacate the permanent injunction issued by the district court below.

III.

For the reasons stated, the permanent injunction issued by the district court is VACATED, and this case is REMANDED to the district court with instructions to transfer it under 28 U.S.C. Sect. 1406(a) to the Eastern District of Kentucky.

Supreme Court, U.S.
FILED
JUL 12 1993
OFFICE OF THE CLERK

No. 92-1831

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

NORTHERN KENTUCKY WELFARE RIGHTS ASSOCIATION, and MICHELLE ASBURY - - - - - Petitioners

versus

BRERETON JONES, Governor of Kentucky - - - - - - - - Respondent

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

QUESTION PRESENTED

Does an annual application by a state for an allocation of funds under § 2605 of Title XXVI to the Low Income Energy Assistance Act (LIHEAA) of 1981, P.L. 97-35, as amended, 42 U.S.C. § 8624(b)(2), whereby a state participating in the LIHEAA grant program agrees to make payments to certain low income households only under the conditions specified therein, create any rights enforceable by members of those households under 42 U.S.C. § 1983, or create an implied private right of action by such members.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

NORTHERN KENTUCKY WELFARE RIGHTS ASSOCIATION, and
MICHELLE ASBURY - - - - - - - - *Petitioners*

v.

BRERETON JONES, GOVERNOR OF KENTUCKY - *Respondent*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Sixth Circuit, No. 92-5634 (January 19, 1993).

COUNTERSTATEMENT OF THE CASE

Respondent agrees with Petitioners' statement of the case, including the procedural history and the applicable statutes and regulations, except as follows. Petitioners' statement fails to state that *all* households with income less than 110 percent of the poverty level were eligible for crisis funds on a first come basis so long as such funds were available.

REASONS FOR DENYING THE WRIT

Petitioner asserts that there is a conflict between the decision of the Sixth Circuit in this case and certain decisions of other Circuits, as well as a conflict with the decision of the U.S. Supreme Court in *Suter* v. *Artist M.*, ___ U.S. ___, 112 S.Ct. 1360, 118 L.Ed.2d 1 (1992). On page ten of the petition it is stated:

> Both types of conflicts exist in this case and the rights of hundreds of thousands of people are affected. For example, in the Fiscal Year 1990 Kentucky Plan, 186,000 households with incomes below 110% of poverty were categorically excluded.

This statement is very misleading. No households with incomes below 110% of poverty were categorically excluded from the Kentucky Plan. All such households were eligible for crisis assistance. It is true that in 1983 the Eighth Circuit held that LIHEAA created a private right of action to enforce assurances made in a State Plan to the Secretary of the Department of Health and Human Services (HHS), and that the Fourth and Sixth Circuits have subsequently held that no such enforceable rights exist. However, any conflict between those Circuits as to that issue has been resolved by this Court.

On March 25, 1992, the United States Supreme Court resolved any conflict in legal theory on this issue with the decision of *Suter, supra.* In *Suter,* the Court considered the enforceability under § 1983 and by private right of action of certain requirements and assurances of State Plans under the Federal Adoption Assistance and Child Welfare Act ("the Act"). Section 671(a) of the Act requires as a condition for Federal funds that a participating State have a plan, approved by the Secretary. Such plan contains sixteen listed features.

The Court carefully considered the development of the doctrine of implied private rights of action to enforce Fed-

eral laws and rights enforceable under § 1983 from *Cort* v. *Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d (1975), to *Wilder* v. *Virginia Hospital Assn.*, 496 U.S. 498, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990), including *Maine* v. *Theboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980), *Pennhurst* v. *State School and Hospital* v. *Halderman*, 451 U.S. 1, 101 S.Ct. 1531 67 L.Ed.2d 694 (1981), *Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 107 S.Ct. 766, 98 L.Ed.2d 781 (1987) and *Golden State Transit Corp.* v. *Los Angeles*, 493 U.S. 103, 110 S.Ct. 444, 107 L.Ed.2d 420 (1989). The Court held that no right enforceable under 42 U.S.C. § 1983 exists to enforce conditions on the grant of Federal funds to a state unless Congress confers such a right unambiguously in the Act. The Court further held that statutory provisions must be analyzed in detail, in light of the entire legislative enactment to determine whether the language of the Act clearly creates an enforceable right within the meaning of Section 1983. Moreover, the Court reaffirmed that there is no implied private right of action under a statute unless Congress intended to make a private remedy available to enforce the statute.

In *Cabinet for Human Resources* v. *Northern Kentucky Welfare Rights Association*, 954 F.2d 1179 (6th Cir. 1992) (LIHEAP II), the Sixth Circuit carefully analyzed the entire Act and concluded the Act did not provide a private right of action to enforce requirements of 42 U.S.C. § 8624. In LIHEAP II, LIHEAA did not satisfy any of the applicable *Cort* standards. The Court found that Congress did not intend to create a federal right of action and that it would be inconsistent with the underlying purpose of the legislative scheme to imply an original federal remedy.

In the instant case (LIHEAP I) the Sixth Circuit correctly applied the law as set forth in *Suter*. The analysis performed in LIHEAP II applies to this case as well. The

two cases involve the same Act, and both sections involve general directives to the State as a condition for receipt of federal funds. The provision at issue in this case, Section 8624(b), is a list of assurances a state is required to provide to the Secretary for Health and Human Services in order to receive funding. Like *Suter*, the parties agree that the State had a plan, that the plan contained the required assurances, and that the plan was approved by the Secretary.

Furthermore, like the Act analyzed in *Suter*, the section of LIHEAA at issue here does not impose any additional binding obligations on a participating state that are sufficiently specific and definite and intended to benefit these petitioners. LIHEAA does not provide more than vague and amorphous guidance to a state in carrying out its generalized duties under the statute, or to the Courts in enforcing them. LIHEAA does not remain unenforced, however, because a state's limited duties thereunder are enforced by the federal agency administering the grants, HHS.

Petitioner seeks to distinguish the *Suter* decision from the decision of the Sixth Circuit in LIHEAP II by reference to the language in *Stovell* v. *Ives*, 976 F.2d 65, 71 (1st Cir. 1992) In *Stovell* a distinction was made between a statutory provision which is a communication to a specific federal official whose approval is required prior to a state's receipt of federal funds and one which is a communication from Congress directly to states which elect to apply for earmarked funds. Petitioner asserts that LIHEAA (the Act) "imposes precise requirements on the states". Those precise requirements are that the state agrees to make payments only with respect to certain households and not to exclude any incomes under 110% of poverty. But these "requirements" are "assurances by the chief executive officer of the State" to the Federal Secretary of Health and Human Services.

The parallel between this case and *Suter* is even closer. As outlined above, the assurances do not constitute a precise method of calculating the amount each household will receive. Each state is free to design its own method; and this may or may not include a subsidy component. The assurances are very general in nature and the Act does not provide any specific benefits for any specified individuals. It is not an entitlement program. Like the Adoptive Assistance Act, LIHEAA provides general directions to states which prescribe the actual method of determining payments to be made.

The Court's language in *Suter, supra,* 112 S.Ct. at 1369, is clearly applicable to this case:

> (The Act) does not contain statutory guidance on how to measure reasonable efforts. The meaning will vary with the circumstances of each individual case. Regulations are not specific and do not provide notice to the states that failure to do anything other than submit a plan with the requested features, to be approved by the Secretary, is a further condition on the receipt of funds from the Federal Government.

The remedy provided by LIHEAA as well as the Act for a state's failure to follow its assurances to the Secretary is loss of federal funds. The Court has found such a remedy sufficient for enforcement of federal funding statutes.

CONCLUSION

The U.S. Supreme Court in *Suter* v. *Artist M., supra,* resolved the conflict over existence of enforceable rights and an implied private right of action based on assurances in a state plan approved by the federal Secretary. In the instant case, the Sixth Circuit has properly applied the principles of *Suter* and correctly found that the petitioners do not have an implied private right of action under 42 U.S.C. § 8624(b)(2) and that this section does not create

any right enforceable by petitioners under 42 U.S.C. § 1983. There is no just cause for a Writ of Certiorari to issue, and therefore, the petition should be denied.

Respectfully submitted,

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